

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

10 CR. 100 (JG)

- v. -

:

COREY DAVIS,

:

Defendant. :

-----X

DEFENDANT COREY DAVIS'S MOTION AND MEMORANDUM IN SUPPORT THEREOF
TO SUPPRESS CUSTODIAL STATEMENTS

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Assistant United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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**DEFENDANT COREY DAVIS'S MOTION AND MEMORANDUM IN SUPPORT THEREOF
TO SUPPRESS CUSTODIAL STATEMENTS**

The defendant, Corey Davis, hereby moves under Federal Rules of Criminal Procedure 12(b)(3) and 41(h) to suppress certain statements elicited from him in violation of his Miranda and Fifth Amendment rights. In particular, Mr. Davis moves to suppress statements that he made without being informed of his Miranda rights. These statements were the product of custodial interrogation by a lieutenant of the Bureau of Prisons who was investigating a physical altercation between Mr. Davis and another prisoner.

Statement of Facts

Corey Davis is charged in a one-count indictment with having assaulted a fellow inmate at the Metropolitan Detention Center in Brooklyn, in violation of 18 U.S.C. § 113(a)(6), on May 8, 2009. See Indictment, attached as Exhibit A.

On May 8, 2009, Mr. Davis was incarcerated at the

Metropolitan Detention Center in Brooklyn. See Declaration of Corey Davis (hereinafter "Davis Decl."), at ¶ 2, attached as Exhibit B. He was being housed in the "B-A Unit," an open dormitory, general population unit with approximately 120 inmates assigned to it at that time. See id. He was able to move freely among the dormitory room, the television room, and the recreation deck, and to use the telephone freely. See id. His movement was restricted only during the counts and the evening lockdown. See id. That afternoon, Mr. Davis and fellow inmate Robert Wright ("John Doe" in the indictment) had an altercation. See id. at ¶ 3.

Immediately after the altercation, Mr. Davis was transferred out of general population and into the segregated housing unit ("SHU"), where he was held in a small single cell with only a door slot and small window for 23 hours a day. See id. at ¶ 4. In the SHU, he could not move freely to any other destination within the prison, he had little ability to communicate with other inmates, he was only permitted one social call per month, and he had to receive specific permission to make a legal call or visit the small SHU law library. See id.

In the early evening of May 8, 2009, after Mr. Davis had been placed in the SHU cell, Lieutenant Selby of the BOP Special Investigative Section ("S.I.S.") came to the SHU to speak to Mr. Davis about the altercation with Robert Wright. See id., at ¶ 5.

Lieutenant Selby stood at the small window of the cell and spoke to Mr. Davis through the glass. See id. The lieutenant identified himself as a member of S.I.S. and informed Mr. Davis that he was investigating the incident. See id. The lieutenant stood at the glass and spoke to Mr. Davis for approximately five to ten minutes, telling Mr. Davis what he had heard from other inmates had occurred, and asking Mr. Davis for his version of the altercation. See id. At no point did the lieutenant inform Mr. Davis of his rights, neither his Miranda rights nor his rights under the BOP administrative procedures. See id., at ¶ 6. At no point did the lieutenant ask Mr. Davis, who was standing within the small cell, whether Mr. Davis wished to speak to him. See id. At no point did the lieutenant inform Mr. Davis that he had no obligation to speak to him. See id. Mr. Davis believed he was not free to decline to speak to the lieutenant, and that if he were to refuse to answer, he would get in more trouble. See id.

After the altercation and the interview with Lieutenant Selby, Mr. Davis was held for a period of seven months in the SHU at MDC Brooklyn, before being transferred first to FDC Philadelphia for one month, and then to FCI Beckley, where he continued to be held in the SHU. No administrative or BOP proceeding was ever held regarding the altercation between Mr. Davis and Mr. Wright. On February 12, 2010, an indictment was filed charging Mr. Davis with the alleged assault that was the

subject of his interview by Lieutenant Selby. See Indictment, Exhibit A.

The government has produced a typewritten statement that it contends contains Lieutenant Selby's write-up of what Mr. Davis said to him during this interview. See "Inmate Statements CD-2", attached as Exhibit C; 7/27/10 Conference Transcript, at 6.2-9, attached as Exhibit D. The government has indicated that it intends to introduce Mr. Davis's statements to Lieutenant Selby at trial. 7/27/10 Conference Transcript, at 6.11-12. The government has conceded that no Miranda warnings were given to Mr. Davis prior to or during this interview. Id. at 6.13-19.

Argument

Mr. Davis was subjected to custodial interrogation by a BOP officer acting in an investigative capacity without first being warned of his Miranda rights. Any statements he made during this interrogation may not be used in the government's case-in-chief under the rule established in Miranda v. Arizona, 384 U.S. 436 (1966).

The government may use a defendant's statement without transgressing his Fifth Amendment right against self-incrimination only when the decision to confess is the defendant's free choice. See Miranda, 384 U.S. 436, 444 (1966). "The prosecution may not use statements, whether exculpatory or

inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."

Id. Specifically, prior to a custodial interrogation, a law enforcement agent must warn the defendant of his rights to remain silent and to legal counsel. 384 U.S. at 479. If a suspect is not so warned, the prosecution is barred from using statements obtained during the custodial interrogation to establish its case-in-chief. See Michigan v. Harvey, 494 U.S. 344, 350 (1990).

An interview is a custodial interrogation for *Miranda* purposes "when a law enforcement official questions an individual and that questioning was (1) conducted in custodial settings that have inherently coercive pressures that tend to undermine the individual's will to resist and compel him to speak (the in custody requirement), and (2) when the inquiry is conducted by officers who are aware of the potentially incriminatory nature of the disclosures sought (the investigative intent requirement)" United States v. Morales, 834 F.2d 35, 38 (2d Cir. 1987).

I.

Mr. Davis Was Not Advised Of His Miranda Rights.

The government has conceded that at no point before or during this interrogation was Mr. Davis advised of his rights to remain silent or to have the assistance of counsel.

II.

Mr. Davis' Statements Were The Product
Of Custodial Interrogation.

There is no per se rule requiring Miranda warnings when a person is questioned while in prison. However, these warnings must be given when questioning occurs in a custodial setting. The Second Circuit recently has emphasized that in evaluating whether a particular interrogation occurred in a custodial setting, a "court should consider, among other things, 'whether a reasonable person would have *thought he was free to leave the police encounter at issue.*'" Georgison v. Donelli, 588 F.3d 145, 156 (2d. Cir. 2009) (emphasis in original). In making this determination, the Second Circuit has looked to the following factors: (1) the behavior and subjective understanding of the defendant during the interview; (2) whether there was a "measure of compulsion above and beyond that inherent in custody itself"; (3) whether the defendant was physically restrained during the interview; and, (4) the nature of the room where the interrogation took place. *Id.* at 157.¹

The statements taken by Lieutenant Selby are the product of

¹ "[C]ourts of all jurisdictions now appear to agree that the proper inquiry is into whether there are additional restraints, above and beyond those generally associated with daily prison life, and whether the inmate felt or thought that he was free to leave the interview." United States v. FNU LNU, No. 09 Cr. 1207 (RPP), 2010 WL 1686199, at n. 10 (S.D.N.Y. April 22, 2010) (citing 2 Wayne R. Lafave et al., Criminal Procedure §6.6(b), n. 16 (3d ed. 2007)).

custodial interrogation. Mr. Davis did not believe he was free to refuse to participate in the interview. His transfer from general population to the segregated housing unit increased the compulsory nature of the setting beyond that inherent in the typical prison setting. See United States v. Marion, No. 09-382 (KI), 2010 WL 1641150, *2-3 (D. Or. April 19, 2010); see also Maryland v. Shatzer, ___ U.S. ___, 130 S.Ct. 1213 (2010) (return to general prison population qualified as a break in custody for purposes of Miranda and Edwards v. Arizona). Indeed, it was only a couple of hours prior to the interview that Mr. Davis had been taken out of general population and placed in the severely restricted segregated housing unit because of the incident that was the subject of the interview. He was inside his solitary cell throughout the interview with Lieutenant Selby and had no ability to go anywhere else, or to move out of earshot of Lieutenant Selby. The lieutenant did not ask Mr. Davis if he were willing to speak with him, but, instead, immediately after identifying himself as a member of the special investigative section, began trying to elicit statements from Mr. Davis about the altercation. While Mr. Davis was not in handcuffs, he was inside a very small locked room with the lieutenant speaking to him through the glass window of the cell, standing in close proximity to Mr. Davis. Taken together, these facts compel the conclusion that a reasonable person would not have "thought he

was free to leave." Georgison, 588 F.3d at 156-57. Indeed, Mr. Davis subjectively believed he had to answer the lieutenant's questions or he would be punished further.

III.

The Custodial Interrogation Was Conducted By An Officer Who Was Aware of the Potentially Incriminatory Nature Of The Disclosures Sought.

An officer's investigative intent is determined by his awareness that information he elicits could be used in a criminal prosecution, not by the likelihood that such information will in fact be used. Mathis v. United States, 391 U.S. 1, 4-5 (1968); United States v. Rodriguez, 356 F.3d 254, 256-58 (2d Cir. 2004); United States v. FNU LNU, No. 09 Cr. 1207 (RPP), 2010 WL 1686199, at *10 (S.D.N.Y. April 22, 2010).

Here, the lieutenant who questioned Mr. Davis was an S.I.S. officer specifically tasked with investigating the incident. There is no reason to believe the lieutenant was unaware that assaults within the prison can be the subject of a criminal prosecution, and that a defendant's statements can be used in such prosecutions.

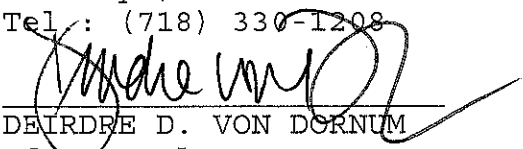
Conclusion

The Government cannot meet its burden of showing that the statements were not obtained in violation of the Fifth Amendment. Accordingly, the Fifth Amendment requires that Mr. Davis's statements to the Lieutenant be suppressed. **Wherefore**, it is respectfully requested that this Court enter an order suppressing the statements made by Mr. Davis to Lieutenant Selby, which were obtained in violation of the Fifth Amendment to the United States Constitution.

Dated: Brooklyn, New York
August 9, 2010

LEONARD F. JOY, ESQ.
Federal Defenders of New York, Inc.

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TO: **LORETTA E. LYNCH, ESQ.**
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Brooklyn, New York 11201
Attn: **AMIR TOOSSI, ESQ.**
Assistant United States Attorney

EXHIBIT A

EJK:AHT
F.#2009R01479

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ FEB 12 2010 ★

BROOKLYN OFFICE

-----X

UNITED STATES OF AMERICA

- against -

COREY DAVIS,

Defendant.

-----X

THE GRAND JURY CHARGES:

INDICTMENT

CR 10 - 0100

(Title 18, U.S.C., §§
113(a)(6) and 3551 et
seq.)

GLEESON, J.
MANN, M.J.

ASSAULT

On or about May 8, 2009, within the Eastern District of New York and the special maritime and territorial jurisdiction of the United States, to wit: the Metropolitan Detention Center in Brooklyn, New York, the defendant COREY DAVIS did knowingly and intentionally assault John Doe, an individual whose identity is known to the Grand Jury, resulting in serious bodily injury.

(Title 18, United States Code, Sections 113(a)(6) and 3551 et seq.)

A TRUE BILL


FOREPERSON


BENTON J. CAMPBELL
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

No.

UNITED STATES DISTRICT COURT

EASTERN *District of* NEW YORK

CRIMINAL DIVISION

THE UNITED STATES OF AMERICA

vs.

Corey Davis,

Defendant.

INDICTMENT

(T. 18, U.S.C., §§ 113(a)(6) and 3551 et seq.)

A true bill.

Janette A. Fanning

Foreman

Filed in open court this _____ day,

of _____ A.D. 20 _____

Clerk

Bail, \$ _____

Amir Toossi, Assistant United States Attorney, (718) 254-6176

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

10 CR. 100 (JG)

- v. - :

COREY DAVIS, :

Defendant. :

-----X

DECLARATION OF COREY DAVIS

I, Corey Davis, hereby declare under the penalties of perjury, pursuant to 28 U.S.C. § 1746, that:

1. I am the defendant in the above-captioned case and I make this declaration in support of a motion to suppress statements obtained from me by law enforcement in violation of my constitutional rights. Since the only purpose of this declaration is to show that my constitutional rights were violated, I have not included every detail of what occurred.
2. On May 8, 2009, I was incarcerated at the Metropolitan Detention Center in Brooklyn. I was in general population. I was assigned to Unit 3-N, also known as the "B-A Unit," which is a general population unit that houses about 120 inmates. It is an open dorm, so I was able to move freely from the dormitory room to the television room or to the recreation deck, other than during counts or lockdown. I could also use the telephone freely. I had weekly social visits, including with my son. I was allowed to go the law library three times a week.
3. On the afternoon of May 8, 2009, another inmate in the unit, Robert Wright, and I had an altercation.
4. Immediately after the altercation, the guards took me out of the general population unit, and put me in the SHU. I was placed first in a holding cell, and then in a small single cell with solid walls, a slot in the steel door, and a small glass window. I was only allowed out of the cell one hour a day. While in the cell, I had no contact with other inmates. I was only permitted one social call per month. I had to receive permission to make a legal call or visit the law

library.

5. In the early evening of May 8, 2009, I was standing in the SHU cell when a lieutenant came to the small glass window. He spoke to me through the glass for approximately five to ten minutes. He said he was from S.I.S. and that he was investigating the incident I had with Wright. The lieutenant told me he had received the unit incident report. He told me what other inmates were saying happened between me and Wright. He asked me what happened. I answered his questions.
6. The lieutenant never asked me whether I wished to speak to him or not. He never told me I had the right not to speak to him. He never told me I had a right to a lawyer.
7. I answered the lieutenant's questions because I did not want to get in more trouble, and the lieutenant was standing right there, speaking directly to me through the glass. I did not believe I could refuse to say anything.

Wherefore, it is respectfully requested that this Court enter an order suppressing the statements taken from me by the lieutenant on May 8, 2009, which were obtained in violation of the Fifth Amendment to the United States Constitution.

I declare under penalty of perjury that the foregoing is true and accurate.

Dated: Brooklyn, New York
August 9, 2010
CD

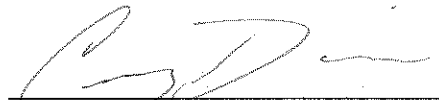
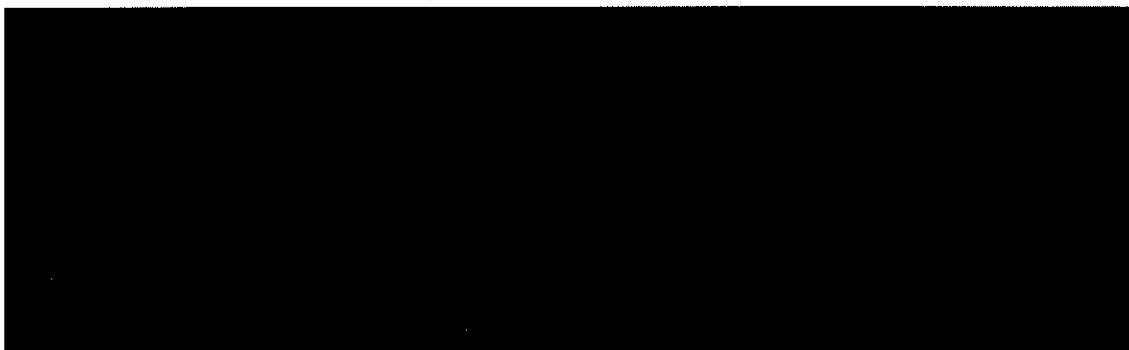

Corey Davis

EXHIBIT C



Inmate Statements:

Inmate Davis stated that Inmate Wright was disrespecting him and making racial slurs towards him. He attempted to walk away from him and Inmate Wright continued belittling him and made a comment about his mother. It was at that time that he became angry and began assaulting Inmate Wright. He states that he would never want to fight or assault an older man in the condition of Inmate Wright and that he attempted to walk away but Inmate Wright kept persisting. In order to not look weak in front of the other inmates, he felt like he had to assault Inmate Wright. He also stated that Inmate Wright attempted to hit him with his cane.



LIMITED OFFICIAL USE — SENSITIVE

5/17/09 (P)

EXHIBIT D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA, : 10 CR 100
:
-against- :
United States Courthouse
Brooklyn, New York
COREY DAVIS, :
July 27, 2010
Defendant. : 2:00 o'clock p.m.

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TRANSCRIPT OF CONFERENCE
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
BY: AMIR TOOSSI
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Federal Defenders

Court Reporter: Gene Rudolph
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(718) 613-2538

Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription. Davis, Judge

1 MR. TOOSSI: Your Honor, the -- my response to that
2 last question would be that the defendant was not advised of
3 his Miranda rights.

4 THE COURT: Do you intend to offer these at trial?

5 MR. TOOSSI: At this time, yes.

6 THE COURT: Okay.

7 MR. TOOSSI: I think the government's -- the
8 government's position as to those statements would be that
9 there was no interrogation.

10 THE COURT: Okay. So there you go. There are no
11 Miranda warnings.

12 You are moving to suppress?

13 MS. VondORNUM: It's likely, Your Honor.

14 Similarly, for CD-2.

15 THE COURT: All right. One step at a time.

16 MS. VondORNUM: Sorry.

17 Yes. Yes, we will move --

18 THE COURT: Taking baby steps here.

19 MS. VondORNUM: We will move to suppress.

20 THE COURT: All right. Now you know what you need
21 to know about CD-3.

22 MS. VondORNUM: Yes.

23 THE COURT: Okay. CD-2 is the next bullet point in
24 your letter of July 26th.

25 MS. VondORNUM: Yes. It is the other statement

1 about which we received no information on that one.

2 THE COURT: I take it, since this is Rule 16
3 material, this must have been given -- this must be a
4 statement made by the defendant to a person who was then known
5 to the defendant to be a law enforcement officer.

6 MR. TOOSSI: Yes.

7 THE COURT: Okay. That officer is who?

8 MR. TOOSSI: Lieutenant Selby of the Bureau of
9 Prisons. He's now assigned to Tucson, Arizona.

10 THE COURT: Got it.

11 Are you offering these statements at trial?

12 MR. TOOSSI: At this time we intend to, yes.

13 THE COURT: Okay. If there is a motion to suppress
14 these on the ground that hypothetically there were no Miranda
15 warnings, would the response to that be yes, there were?

16 MR. TOOSSI: There were not. The government's
17 position was that -- position would be that the defendant was
18 not in custody at that time, under -- hold on -- because I
19 know that sounds ridiculous on its face.

20 THE COURT: No. I understand.

21 MR. TOOSSI: Because --

22 THE COURT: You are not always necessary in custody
23 for Miranda purposes even you are not free to leave the
24 premises.

25 MR. TOOSSI: Yes. I am going under the line of

1 cases under -- sorry, Your Honor. I just forgot the name.

2 THE COURT: That's all right. We don't even have a
3 motion yet.

4 You know what's coming, right? That's the discovery
5 you want?

6 MS. VONDORNUM: Yes, Your Honor.

7 THE COURT: All right. Progress is being made here.

8 Next in the letter is to ensure that the
9 officers -- a request that the officers retain all notes and
10 memoranda, including those in scratch form.

11 I think Ms. VonDornum is right about this.

12 MR. TOOSSI: Your Honor, I have done that. But with
13 the caveat of this, is that -- my understanding of the
14 investigation that was conducted into the assault was that it
15 was conducted by multiple people. Now, they have not all been
16 identified to me. For one reason or another, and I know that
17 it is not a -- it's not a great excuse, but the reality is
18 that BOP hasn't been able to identify everybody who was
19 involved in the investigation to me.

20 To the extent that there is anybody involved in it
21 that I am not currently aware of, I have not told them that.
22 But if I am aware of a person who was involved in the
23 investigation, I have asked them to retain what they have.

24 THE COURT: All right. I don't want to get too
25 involved in the abstract application of this principle. Let